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In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHERN ILLINOIS GAS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the IRS's classification of its utility trucks as "truck-trailer combinations" for highway use tax purposes. The question presented is identical with that on which this Court denied certiorari in *Northern States Power Co.* v. *United States*, 663 F.2d 55 (8th Cir. 1981), cert. denied, 456 U.S. 965 (1982). Although there is a circuit conflict on the question, that conflict existed when the petition in *Northern States Power Co.* was before the Court, and certiorari was nevertheless denied. Since then, Congress has resolved the matter by legislation, codifying the IRS position sustained by the court below, and the question thus has no prospective importance. Review by this Court under these circumstances is unwarranted.

1. The statutory and regulatory scheme implementing the highway use tax is detailed in our brief in *Northern States Power Co.* (81-1437 Br. in Opp. at 3-6).[1] Section 4481(a) of the Code[2] imposes a use tax on motor vehicles according to weight. But the weight to be taken into account is not merely that of the self-propelled vehicle alone. Rather, Section 4481(a) requires that the "taxable gross weight" of a given motor vehicle include the weight of trailers "customarily used in connection with highway motor vehicles of the same type." Section 4482(b) in turn provides that taxable gross weight "shall be determined under regulations prescribed by the Secretary (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise)."

Pursuant to that legislative authority, the Secretary of the Treasury promulgated Treas. Reg. § 41.4482(b)-1(d). It established a class of vehicles called "truck-trailer combinations," and assigned weights to vehicles of that class based, inter alia, on their towing capacity and equipment. Subsection (d)(3) specified that trucks "equipped for use" in combination with trailers may be classified as truck-trailer combinations and taxed as such. Treas. Reg. § 41.4482(b)-1(d)(3). In 1976, the IRS issued an interpretive ruling stating that utility trucks equipped with a heavy-duty "pintle hook" — a coupling device or hitch permitting the truck to tow heavy-duty trailers — are "equipped for use" with trailers within the meaning of the Regulation and hence should be taxed as truck-trailer combinations under the taxable gross weight schedule. Rev. Rul. 76-294, 1976-2

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[1]A copy of that brief is being furnished to petitioner's counsel.

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the tax years at issue (the Code or I.R.C.).

C.B. 364. Read together, the Regulation and ruling establish a general rule that utility trucks equipped with heavy-duty pintle hooks are to be taxed as "truck-trailer combinations," without a factual inquiry into whether the particular taxpayer involved actually hooks trailers up to that type of vehicle with any particular degree of frequency.

2. Petitioner is a public utility that owns service trucks equipped with heavy-duty pintle hooks (Pet. App. 2a). Petitioner took the position that these trucks should be classified, not as "truck-trailer combinations," but as "single units," in which event they would be too light to be taxed. Petitioner contended that Treas. Reg. § 41.4482(b)-1(d)(3) and Rev. Rul. 76-294, which foreclosed its desired classification, were invalid. It was not enough, petitioner contended, that its trucks are "equipped for use" with heavy-duty trailers. Rather, the governing statute in petitioner's view required the IRS to make a factual determination, on a nationwide basis, of the frequency with which trucks like its trucks are in fact used with heavy-duty trailers. I.R.C. § 4481(a); see Pet. App. 4a.

When the IRS demurred to these arguments, petitioner brought this refund suit in the United States District Court for the Northern District of Illinois. That court upheld the validity of the Regulation and the Commissioner's imposition of the tax (Pet. App. 16a-21a). The court of appeals affirmed, one judge dissenting (*id.* at 1a-12a).

The court of appeals noted that Treas. Reg. § 41.4482(b)-1(d)(3), which established the "equipped for use" standard, was promulgated under a specific grant of legislative authority (I.R.C. § 4482(b)) and was thus endowed with a strong presumption of correctness (Pet. App. 6a). The court, moreover, held that the "equipped for use" standard was "a reasonable implementation of the 'customarily used' standard contained in the statute" (*ibid.*). "It is not unreasonable to assume," the court said, "that vehicles are

equipped for use with heavy trailers for the purpose of using them with heavy trailers" (*ibid.*). Although the general rule embodied in the Regulation might not reflect the actual pattern of use of every utility truck in the country, the court noted, Congress "in permitting the Secretary to create general classifications to be used in determining taxable gross weight in particular cases * * * clearly was not insisting on accuracy in every case" (*id.* at 7a). " 'What must be balanced is the advantage of convenience in assessment and collection with admitted inaccuracies in some individual instances.' " *Ibid.* (quoting *Atlas Transportation Co.* v. *United States*, 263 F.2d 573, 576 (3d Cir.), cert. denied, 360 U.S. 918 (1959)).

3. The decision below is correct. As explained more fully in our brief in *Northern States Power Co.* (81-1437 Br. in Opp. at 6-8), it is beyond dispute that petitioner's heavy-duty trailers, when used, are used "in connection with highway motor vehicles of the same type" (I.R.C. § 4481(a)) as the vehicles involved here. Petitioner's trailers, therefore, are "customarily used in connection with" such vehicles (*ibid.*), and the vehicles are thus taxable as truck-trailer combinations under the governing statute. And even if Section 4481(a) did not mandate the Secretary's "equipped for use" interpretation, it surely permits that construction, particularly under the deferential standard of review applicable to legislative regulations. *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981); *United States* v. *Correll*, 389 U.S. 299, 307 (1967). The Secretary's construction, moreover, is supported by strong considerations of practicality, since the nationwide truck-by-truck factual investigation upon which petitioner appears to insist would make the highway use tax virtually inadministrable.[3]

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[3]There is no merit to petitioner's contention (Pet. 4, 7, 15) that the IRS changed its administrative practice in implementing Treas. Reg.

4. As petitioner notes (Pet. 5-8), there is a difference of opinion among the circuits on the question presented. The Seventh Circuit's decision in this case accords with the Eighth Circuit's decision in *Northern States Power Co., supra*, but conflicts with the Ninth Circuit's decision in *Pacific Gas & Electric Co.* v. *United States*, 664 F.2d 1133 (1981). The circuit conflict represented by the latter two cases, however, was before the Court in *Northern States Power Co.* (see 81-1437 Br. in Opp. at 8-10), and certiorari was nevertheless denied (456 U.S. 965 (1982)).

The question presented is less deserving of certiorari now than it was then. Eight months after certiorari was denied in *Northern States Power Co.*, Congress, on January 6, 1983, resolved the question prospectively by codifying the Secretary's interpretation of the statute. Highway Revenue Act of 1982, Pub. L. No. 97-424, Tit. V, § 513(c), 96 Stat. 2179. In a provision entitled "Clarification of Trailers Customarily Used in Connection with Highway Motor Vehicles," that law amended Section 4482(b) to provide explicitly that "[a] semitrailer or trailer shall be treated as customarily used in connection with a highway motor vehicle if such vehicle is

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§ 41.4482(b)-1(d)(3). The early rulings to which petitioner refers (Pet. 7) consistently distinguished between trucks properly classifiable as "truck-trailer combinations" and trucks classifiable as "single units," depending on whether the trailers to be towed were "heavy" or "light" trailers. And those early rulings consistently predicated that determination on the capacity of the hitch or "pintle hook" involved. Although there is language in some General Counsel Memoranda (GCMs) that supports petitioner's position (see Pet. 4 & n.2), GCMs are not authoritative sources as to the administrative practice of the IRS. Such memoranda are developed, issued, and maintained solely as opinions of the IRS Chief Counsel and, in this instance at least, did not accurately state IRS policy as set forth in the Commissioner's published rulings. In any event, the GCMs upon which petitioner relies have been revoked (GCM 38962 (Feb. 9, 1983)), and it is well established that the Commissioner may correct an earlier position he determines to have been erroneous. *Dickman* v. *United States*, No. 82-1041 (Feb. 22, 1984), slip op. 12-13.

equipped to tow such semitrailer or trailer." Pub. L. No. 97-424, § 513(c), 96 Stat. 2179 (adding I.R.C. § 4482(c)(5)). The amendment was made effective July 1, 1984 (Pub. L. No. 97-424, § 513(f)(1), 96 Stat. 2179). Since the interpretation of the statute adopted by the Seventh Circuit below and by the Eighth Circuit in *Northern States Power Co.* is now incorporated in the Internal Revenue Code, the Ninth Circuit's conflicting decision has no continuing importance.[4]

5. Finally, petitioner errs in contending (Pet. 12-16) that the Administrative Procedure Act (APA), 5 U.S.C. 553(b), required the IRS to afford public notice and hold a hearing before issuing Rev. Rul. 76-294, *supra*. As petitioner concedes (Pet. 12), the APA does not apply to IRS interpretive rulings, and, as the court of appeals correctly held (Pet. App. 4a), Rev. Rul. 76-294 is an interpretive rule. The "equipped for use" standard petitioner challenges was promulgated, not in the ruling, but in Section 41.4482(b)-1(d)(3) of the Treasury Regulations. That is a "legislative" regulation and, as the court of appeals noted (Pet. App. 4a n.3), it was promulgated in conformance with the APA's requirements.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[4]There is no merit to petitioner's contention (Pet. 8-10) that certiorari should be granted, despite the lack of prospective importance, because of the number of pending cases that raise the instant question for tax periods before June 30, 1984. The IRS informs us that the "262 cases * * * pending at the IRS administrative level" to which petitioner refers (Pet. 8) involve total contested tax liabilities attributable to the instant question of only slightly more than $6 million.